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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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**APR 3 1997**

Federal Communications Commission  
Office of Secretary

In the Matter of )  
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Requests of U S West Communications, Inc. )  
for Interconnection Cost Adjustment )  
Mechanisms )  
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CC Docket No. 97-90  
CCB/CPD 97-12

**COMMENTS OF  
AMERICAN COMMUNICATIONS SERVICES, INC.**

Riley M. Murphy  
Charles H.N. Kallenbach  
James C. Falvey  
AMERICAN COMMUNICATIONS  
SERVICES, INC.  
131 National Business Parkway  
Suite 100  
Annapolis Junction, MD 20701

Brad E. Mutschelknaus  
Danny E. Adams  
John J. Heitmann  
KELLEY DRYE & WARREN LLP  
1200 19th Street  
Suite 500  
Washington, DC 20036

Attorneys for  
American Communications Services, Inc.

Dated: April 3, 1997

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**COMMENTS OF  
AMERICAN COMMUNICATIONS SERVICES, INC.**

American Communications Services, Inc. ("ACSI"), by its attorneys, hereby submits these Comments on the Petition for Declaratory Ruling and Contingent Petition for Preemption On Interconnection Cost Surcharges ("Petition") filed jointly by Electric Lightwave, Inc., McLeodUSA Telecommunications Services Inc. and NEXTLINK Communications, LLC ("Petitioners") in the above-captioned proceeding.<sup>1</sup>

**I. Introduction**

ACSI is a publicly traded Delaware corporation that provides competitive local access and exchange services through nearly two dozen operating subsidiaries. Headquartered in Annapolis Junction, Maryland, ACSI currently has more than 200 employees operating 24

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<sup>1</sup> *Requests of U S West Communications, Inc. for Interconnection Cost Adjustment Mechanisms*, CC Docket No. 97-90, CCB/CPD 97-12, Petition for Declaratory Ruling and Contingent Petition for Preemption on Interconnection Cost Surcharges (filed Feb. 20, 1997, public notice rel. Mar. 4, 1997) ("*Petition*").

digital fiber networks in small to medium-sized markets throughout the southern United States. An additional 12 networks presently are under construction.

ACSI competes with U S West in three states<sup>2</sup> and, thus, its interest in this proceeding is considerable. ACSI agrees in principle with the Petitioners that U S West's proposed Interconnection Cost Adjustment Mechanism ("ICAM") surcharges are prohibited by the pricing provisions of the Telecommunications Act of 1996<sup>3</sup> ("1996 Act") and are contrary to the Federal Communications Commission's ("FCC" or "Commission") Interconnection Order implementing those provisions.<sup>4</sup> Moreover, ACSI agrees with the Petitioners' contention that state commission approval of U S West's proposed ICAM surcharges would constitute the impermissible creation of a barrier to entry in violation of Section 253. Finally, ACSI concurs with the Petitioners' position that U S West's ICAM proposals are merely the latest installment in U S West's carefully orchestrated strategy to

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<sup>2</sup> ACSI currently operates digital fiber-optic networks in Tucson, Arizona, Albuquerque, New Mexico and Colorado Springs, Colorado. Thus, ACSI competes with U S West in Arizona, where an interconnection agreement between the parties has been arbitrated and approved; New Mexico, where an interconnection agreement has been arbitrated and is awaiting approval by the New Mexico Corporation Commission; and Colorado, where ACSI and U S West currently are negotiating terms of interconnection.

<sup>3</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

<sup>4</sup> 47 U.S.C. § 252(d)(1); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, FCC 96-325, ¶¶ 733-40 (rel. Aug. 8, 1996) ("*Interconnection Order*") *stayed in part by Iowa Utilities Board et al. v. FCC*, No. 96-3321, Order Granting Judicial Review (8th Cir. Oct. 15, 1996).

initiate expensive and time-consuming litigation intended to stop or delay competition and undermine the goals of the 1996 Act.

## **II. ICAM Surcharges Are Prohibited By Section 252(d)(1)**

### **A. U S West May Recover Costs Associated With Meeting Its Statutory Interconnection Obligations Through TELRIC-Based Rates**

The pricing standards set forth by Congress in the 1996 Act call for cost-based rates.<sup>5</sup> Accordingly, the FCC prescribed total element long run incremental cost ("TELRIC") as the costing methodology to be employed in establishing cost-based pricing for interconnection and unbundled network elements.<sup>6</sup> TELRIC-based prices should include *all* relevant costs of interconnecting with and making unbundled network elements available to new entrants.<sup>7</sup> Thus, the "extraordinary" costs that U S West seeks to recover through its proposed ICAM surcharges either already are accounted for--or should be accounted for--in the TELRIC for local service products. Since Congress and the Commission already have decided on the mechanism for recovering the costs of providing interconnection and network elements, there simply is no legal justification for U S West create an additional and duplicative mechanism.

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<sup>5</sup> 47 U.S.C. § 252(d)(1)(A).

<sup>6</sup> *Interconnection Order* at ¶ 672. Although the Eight Circuit has temporarily stayed the effectiveness of the pricing provisions of the *Interconnection Order*, ACSI believes that the Commission should hold firmly to its conclusions until otherwise directed by the Eighth Circuit.

<sup>7</sup> *See Id.* at ¶ 685.

Moreover, by attempting to impose ICAM surcharges in addition to charging TELRIC-based rates for interconnection and network elements, U S West effectively is asking state commissions in its service territory to authorize double recovery of its costs of complying with its statutory interconnection and unbundling obligations.<sup>8</sup> Clearly, this the state commissions cannot do.

**B. U S West's Proposed ICAM Surcharges Are Unreasonable and Discriminatory**

Permitting U S West to impose its proposed ICAM surcharges would violate the pricing mandates set forth by Congress in Section 252(d)(1) as the proposed surcharges are both unreasonable and discriminatory.<sup>9</sup> Section 252(d)(1) incorporates a "just and reasonable" standard for state commission approved rates for interconnection and network elements. As discussed above, U S West's proposed ICAM surcharges are nothing more than an attempt to recover costs that either already are accounted for--or should be accounted for--in TELRIC-based rates. Any pricing arrangement that allows possible double recovery is *per se* unreasonable and, thus, U S West's ICAM surcharges would violate the statutory standard that charges be reasonable.<sup>10</sup>

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<sup>8</sup> U S West's assertion that ICAM surcharges are necessary to prevent an unconstitutionally uncompensated for taking are nothing short of incredible. Even if the takings clause were implicated, U S West's right to double compensation can be found nowhere in the Constitution.

<sup>9</sup> 47 U.S.C. § 252(d)(1).

<sup>10</sup> See *Interconnection Order* at ¶ 698.

Moreover, Section 252(a)(ii) requires that charges for interconnection and network elements also be nondiscriminatory.<sup>11</sup> In as much as U S West seeks to allocate certain costs of providing interconnection and network elements into separate ICAM surcharges, implementation of U S West's proposal would be discriminatory. Including some costs in TELRIC-based local service rates and others in surcharges applicable only to new entrants would violate the statutory standard that rates be nondiscriminatory.<sup>12</sup> The Commission already has established, through its adoption of TELRIC-based pricing, that U S West cannot use one set of costs for establishing its own rates and impose on competitors another higher set of costs to be used as the basis for their rates. Rather, the statute and TELRIC methodology command that incumbents and new entrants alike pay the costs of interconnection and network elements in the same manner and in proportion to use. The Commission recently reaffirmed this rationale in its *Number Portability* decision regarding cost recovery for currently available number portability measures.<sup>13</sup> U S West provides no

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<sup>11</sup> 47 U.S.C. § 252(a)(ii).

<sup>12</sup> *Id.*

<sup>13</sup> See *Telephone Number Portability*, CC Docket No. 95-116, RM 8535, First Report and Order and Further Notice of Proposed Rulemaking (rel. July 2, 1996) ¶¶ 130-38. Additional support for the concept of proportional allocation of any extraordinary costs associated with the network reconfiguration necessitated by the conversion from a monopoly to a competitive environment can be found in the fact that, subsequent to the AT&T divestiture, the cost of equal access network reconfiguration was recovered through access charges. See *United States v. Western Elec. Co., Inc.*, 569 F.Supp. 1057, 1066-68 (D.D.C. 1983). Thus, based proportionately on use, the former monopolist--AT&T-- paid the vast majority of the costs associated with making equal access available to its competitors. New  
(continued...)

compelling reason--lawful or otherwise--why it should be permitted to pay lower costs than its competitors. In fact, the statute prohibits it.

**III. State Commission Approval of ICAM Surcharges Would Create A Barrier to Entry in Violation of Section 253**

ACSI agrees with the Petitioners that permitting U S West to impose ICAM surcharges on new entrants would run afoul of the states' Section 253 mandate to remove barriers to entry.<sup>14</sup> Through its ICAM surcharge proposal, U S West seeks to shift all of the costs of providing interconnection and network elements onto its competitors. Thus, rather than abide by a system where players are expected to pay costs based on proportions of use, U S West in effect asks for a free ride through the imposition of ICAM surcharges. Since U S West itself would not be subject to the ICAM surcharges, they amount to nothing more than an entry fee for entities seeking to infringe upon U S West's local services monopoly.<sup>15</sup> If U S West is allowed to shield its monopoly by imposing such an entry fee on its competitors, competition and new entry will be impeded substantially.

Moreover, Section 253 clearly prohibits state commissions from authorizing such entry fees as they "may prohibit or have the effect of prohibiting the ability of any entity to

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<sup>13</sup>(...continued)  
entrants into the interexchange marketplace paid smaller, but proportionate shares. This same principle should apply to any extraordinary costs associated with the conversion to competition at the local level.

<sup>14</sup> *Petition* at 10-11; 47 U.S.C. § 253(a).

<sup>15</sup> *See Id.* at 11-12.



provide any interstate or intrastate telecommunications service."<sup>16</sup> Competition certainly cannot develop or flourish in an environment where incumbent monopolists can extract entry fees from new competitors. If U S West were permitted to impose ICAM surcharges, not only would competitors' ability to compete on price be undermined severely, but the surcharges collected could be used by U S West to subsidize artificially low rates designed to kill-off existing competitors and forestall new entry altogether.

#### **IV. ICAM Is Nothing More Than U S West's Latest Ploy to Delay or Prevent Realization of the Goals of the 1996 Act**

ACSI also agrees with the Petitioners' assessment that U S West's ICAM surcharges are but the latest installment in a carefully strategized plan to use a barrage of regulatory maneuvers and litigation to prevent or delay the development of competition throughout its service area. U S West's ICAM surcharge proposals, numerous appeals of the state arbitration decisions and challenges to FCC decisions implementing the 1996 Act provide ample evidence of this effort.<sup>17</sup> Recognizing that the multi-faceted, multi-forum approach taken by U S West places much of the problem out of the Commission's hands, ACSI urges

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<sup>16</sup> 47 U.S.C. § 253(a).

<sup>17</sup> ACSI can provide additional examples of U S West's concerted effort to delay competition for as long as possible. For instance, despite repeated requests, U S West has refused to provide ordering forms or establish ordering procedures for basic services, including unbundled loops, 911 trunks and BLV/BLVI, that are necessary to implement interconnection agreements between ACSI and U S West in New Mexico and Arizona. For other examples of U S West's dilatory tactics, see *Petition* at 17, n. 27.

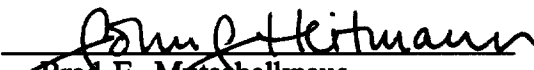
the Commission to take any and all actions within its jurisdiction to curtail the success of dilatory tactics by U S West and other incumbents.

**V. Conclusion**

ACSI implores the Commission to take any and all steps it can to curb the efforts of U S West to undermine the pro-competitive goals of the 1996 Act. Thus, for the reasons stated herein, ACSI supports Petitioners' request for the Commission to issue a declaratory ruling finding that U S West's proposed ICAM surcharges violate Section 252 of the 1996 Act. Additionally, ACSI supports the Petitioners' requests for expedited consideration and for the Commission to initiate proceedings to preempt any and all state commission directives that authorize U S West's imposition of ICAM surcharges.

Respectfully submitted,  
**AMERICAN COMMUNICATIONS  
SERVICES, INC.**

Riley M. Murphy  
Charles H.N. Kallenbach  
James C. Falvey  
AMERICAN COMMUNICATIONS  
SERVICES, INC.  
131 National Business Parkway  
Suite 100  
Annapolis Junction, MD 20701

By:   
~~Brad E. Mutschelknaus~~  
Danny E. Adams  
John J. Heitmann  
KELLEY DRYE & WARREN LLP  
1200 19th Street  
Suite 500  
Washington, DC 20036

Attorneys for  
American Communications Services, Inc.

Dated: April 3, 1997